82 No. 1278

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IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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JURISDICTIONAL STATEMENT FOR INTERVENOR-APPELLANT

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Questions Presented

1. Does the standard permitting court-ordered detention of an accused juvenile delinquent in New York Family Court Act § 739(a)(ii), a judicial finding of serious risk of commission of a crime before trial, supported by facts and reasons stated on the record, satisfy the accused delinquent's right to procedural due process of law?

2. Do the procedural protections an accused juvenile delinquent receives at his pretrial detention hearing under § 739(a), which include all the protections an adult accused of a crime receives at arraignment, and the adversarial finding of probable cause to which he is entitled within six days of the hearing if ordered detained, satisfy the accused delinquent's right to procedural due process of law?

3. Does § 739(a)(ii) deny the accused juvenile delinquents who are detained under it procedural due process of law if the criminal charges against some of them are withdrawn or dismissed before trial and the post-trial dispositional orders for others do not require them to be sent away from home?

4. May a federal writ of habeas corpus release accused juvenile delinquents from pretrial detention who were not ordered detained or in custody until after the writ was granted?

Parties

The caption of the case in this Court contains the names of the parties to the proceeding in the court whose judgment is on appeal except that appellant Ellen Schall, as Commissioner of the New York City Department of Juvenile Justice, has been substituted for Paul Strasburg, as Commissioner of the New York City Department of Juvenile Justice, the respondent-appellant below. Former Commissioner Strasburg resigned his office on November 17, 1982. Ms. Schall was appointed Commissioner on December 28, 1982, effective on January 10, 1983.

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Opinions and Judgments Below

The majority and concurring opinions and the judgment of the Court of Appeals (one document) are reported *sub nom. Martin* v. *Strasburg* at 689 F.2d 365. They are reproduced in Appendix A to this jurisdictional statement and to the jurisdictional statement for appellant.*

The June 1, 1981 judgment of the United States District Court for the Southern District of New York is not reported. It is reproduced in Appendix B. The April 17, 1981 opinion of the district court in support of the judgment is reported *sub nom. U.S. ex rel. Martin* v. *Strasburg* at 513 F. Supp. 691. It is reproduced in Appendix C. The April 3, 1978 interlocutory opinion of the district court is not reported. It is reproduced in Appendix D.

Jurisdiction

Three juveniles who were accused of delinquency and detained before trial under New York Family Court Act § 739(a)(ii) brought the proceeding as representatives of a class. (App. A at 3a; App. C at 32a-33a; App. D at 89a-90a, 91a-92a, 99a-101a**). They sought, and were granted, a writ of habeas corpus and a declaratory judgment. (App. A at 3a, 4a, 23a; App. B at 30a-31a; App. C at 32a, 33a, 88a; App. D at 89a). The jurisdiction of the district court was based on 28 U.S.C. §§ 2241(a), (c)(3), 2254. (*See* App. D at 92a).

The judgment on appeal was filed in the Court of Appeals on September 20, 1982. (App. A at 1a, 29a). The notice of appeal for intervenor-appellant (reproduced in Appendix E) was filed in the Court of Appeals on October 20, 1982. (App. E at 103a). The time in which to docket this appeal was extended from December 20, 1982 to Jan-

* The appendices to the jurisdictional statements for appellant and for intervenor-appellant, lettered "A" through "F", are separately presented in one volume. *See* Supreme Court Rule 15(1)(j).

** References in parentheses preceded by "App." identify the lettered appendix and relevant page(s) in the separate volume of appendices to the jurisdictional statements for appellant and for intervenor-appellant.

uary 24, 1983. Supreme Court Order No. A-521 (Dec. 10, 1982, *Marshall*, J.); Supreme Court Rule 29(1).*

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1254(2) in that the judgment of the Court of Appeals from which the appeal lies held a state statute invalid as repugnant to the United States Constitution.

State Statute Involved

New York Family Court Act § 739 states in part:

> § 739. *Release or detention after filing of petition and prior to order of disposition*
>
> (a) After the filing of a petition under section seven hundred thirty-one [to adjudicate a person a juvenile delinquent] or seven hundred thirty-two [to adjudicate a person to be in need of supervision], the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> * * *
>
> (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.[**]
>
> * * *

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* William E. Spiller, former Acting Commissioner of the New York City Department of Juvenile Justice, is named as appellant in Order No. A-521 and the related application.

** Section 739(a) is not involved insofar as it pertains to the detention of persons in need of supervision ("PINS"), *i.e.*, juvenile status offenders, and to the detention of juvenile deliquents between fact-finding and disposition, *i.e.*, between adjudication, or conviction, of the the crime(s) charged in the petition and sentencing. The class representatives in this case are accused juvenile delinquents who were detained under § 739(a)(ii) before fact-finding (App. C at 32a-33a; App. D at 89a-90a, 91a-92a), and their challenge to the statute was necessarily limited to the injury they allegedly suffered

(footnote continued on next page)

New York Family Court Act § 739

Section 739 is codified in Article 7, *Proceedings Concerning Delinquency and Whether a Person is in Need of Supervision,* of the New York Family Court Act.* The section has several subsections, not challenged below, that are relevant to subsection (a)(ii). Subsection (a)(i) provides another standard for court-ordered detention, a judicial finding of substantial probability that the juvenile will not appear on his next court date, supported, like detention under subsection (a)(ii), by facts and reasons stated in the record. Subsection (b) requires that probable cause be found (or the right to the finding waived) within six days of pretrial detention under subsection (a)(i) or (a)(ii). Subsection (b) further requires that the probable cause finding be made after an adversarial hearing conducted under evidentiary standards applicable at probable cause hearings on felony complaints in adult criminal court. *See* New York Criminal Procedure Law ("CPL") § 180.60. Subsection (c) extends the requirements of subsection (b) to juvenile offenders whose cases are removed to Family Court before trial if probable cause has not yet been found and the right to the finding has not been waived.** Subsection (c) also assures juvenile offenders whose cases are removed, *de novo* consideration of detention under subsection (a)(i) and (a)(ii).

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in those circumstances. (App. D at 99a). *See Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962).

* The Act, as now in effect, is codified in McKinney's Consolidated Laws of New York, Book 29A (Part 1), Judiciary-Court Acts and in the 1981-82 Supplementary Pamphlet for that volume. It is cited hereafter as "FCA § ——" unless the reference is clear from the text. The section numbers correspond to the McKinney codification.

** Juveniles age 13, 14 or 15 charged with certain class A, B and C felonies, *e.g.*, rape 1, burglary 1, may be prosecuted in the adult criminal court as juvenile offenders. New York Penal Law §§ 10.00 (18), 30.00. Juvenile offender cases may be removed to Family Court at any time (except after conviction for murder 2) in the interests of justice and with the consent of the prosecution. CPL §§ 180.75, 190.71, 210.43, 330.25. Once in Family Court, the juvenile offender is a juvenile delinquent for all purposes.

Recent amendments to the New York Family Court Act (L. 1982, cc. 920, 926, eff. July 1, 1983) have revised portions of Article 7 and recodified the juvenile delinquency provisions in a new Article 3.* Section 739(a)(ii), the statute involved in this appeal insofar is it permits the detention of accused juvenile delinquents before fact-finding (*see* p. 2 second footnote), is retained verbatim and recodified as § 320.5(3)(b). The related subsection (a)(i) is also retained verbatim and recodified as § 320.5(3)(a).** Subsection (b), requiring findings of probable cause within six days of pretrial detention under subsection (a)(i) or (a)(ii), is amended to more specifically describe the procedure at probable cause hearings and the findings that must be made. It is recodified, as amended, in §§ 325.1, 325.2 and 325.3.† Subsection (c), which extends the right to findings of probable cause to juvenile offenders whose cases are removed to Family Court, is retained verbatim and recodified as § 325.1(5).

* Sections of the Act, as recodified by L. 1982, cc. 920, 926, are cited hereafter as "Article 3 § ——" unless the reference is clear from the text. The section numbers correspond to those enacted by Chapter 920, § 1.

** Subsection 2 of § 320.5 authorizes the Family Court to release an accused delinquent on terms and conditions it finds appropriate, *e.g.*, going to school regularly, obeying a curfew. Current practice permits conditional release only with the consent of the juvenile and his parent or guardian. Subsection 4 of § 320.5 permits the offer of prior delinquency findings at an accused delinquent's detention hearing ("initial appearance" under Article 3) and would appear to exclude other Family Court and police contacts, *e.g.*, PINS petitions and fact-findings, pending delinquency petitions, adjournments of delinquency proceedings in contemplation of dismissal, arrests. Current practice permits the offer of these contacts.

† Section 325.2 and 325.3 codify the standards for probable cause hearings in CPL § 180.60 for the Family Court. These standards are currently incorporated in § 739(b) by reference to the "evidentiary standards applicable to a [probable cause] hearing on a felony complaint in a[n adult] criminal court." *See* discussion at p. 3, *ante*. Subsection 4 of § 325.2 requires, in addition, that probable cause hearings be completed within two court days. If they are not, the court may dismiss the delinquency petition without prejudice or, for good cause shown, adjourn the hearing. § 325.3(4). In either

(footnote continued on next page)

Statement of the Case

A. The Detention Proceedings against the Named Appellees in New York Family Court

Gregory Martin was fourteen years old when he commenced this federal proceeding on December 21, 1977. (App. D at 90a). He was charged with robbery 1, assault 2 and criminal possession of a weapon 2 in a delinquency petition filed in New York Family Court. (*Id.* at 91a).* He had been arrested on December 13, at approximately 11:30 p.m., after he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers.** Gregory was ordered detained under FCA § 739(a)(ii) after his detention hearing on December 14. The hearing record in support of the order shows that Gregory had the loaded gun in his possession when he was arrested, that he lied to the police about where and with whom he lived and that the incident had occurred at an hour when the presiding judge believed that a fourteen year old would be expected to be at home. Gregory apparently had no prior contacts with the Family Court, *e.g.*, delinquency or PINS petitions or fact-findings (*see* p. 4 second footnote), but he had been warned by the police after an earlier incident. He had a probable cause hearing under FCA § 739(b) on December 19, and probable cause was

event, the juvenile must be released from detention. *Id.* If probable cause is found after the hearing, § 325.3(3) requires the court to determine whether further detention under § 320.5, *i.e.*, § 739(a)(i) or (a)(ii), is necessary. This new provision codifies current practice under § 739(b).

* A delinquency proceeding is initiated by the filing of a petition. FCA § 731. The petition must allege that the juvenile did an act that would be a crime if done by an adult, that he was under 16 at the time and that he requires supervision, treatment or confinement. FCA §§ 712(a), 714(a), 731(1). A crime is any felony or misdemeanor. Penal Law § 10.00(6).

** The facts pertaining to Gregory's arrest and the delinquency proceeding that followed are documented in petitioners' exhibit 1 received in evidence by the district court. The exhibit is reproduced at 754-86 of the joint appendix filed in the Court of Appeals.

found on that date for the crimes charged in the delinquency petition.*

Luis Rosario and Kenneth Morgan joined Gregory Martin as named petitioners on March 31, 1978. (First Amended Petition ¶¶ 3[b], 3[c], A. 5-6**). Luis was then fourteen and was charged with attempted robbery 1 and assault 2 in the delinquency petition. (App. D at 91a). He had been arrested for an incident that occurred on March 2, at approximately 11:15 p.m., when he, with four others, allegedly tried to steal wallets from two men, putting a gun to the head of one of them and hitting both in the head, back and legs with sticks.† Luis was ordered detained under FCA § 739(a)(ii) after his detention hearing on March 15, his first court appearance after arrest. The hearing record shows that Luis was then on release status from a pending designated felony petition (for knifing another youth), *i.e.*, he had been released rather than detained after the § 739(a) hearing on that petition,‡ that he had three prior delin-

* Detention under FCA § 739(a) requires that fact-finding, *i.e.*, trial on the crime(s) charged in the petition, be expedited. FCA §§ 757 (14 days from filing of petition in class A, B and C felonies; 3 days from filing of petition in all other cases), 748 (3-day adjournment authorized for court or prosecutor). Gregory, like the other juveniles described here, proceeded to fact-finding on an expedited schedule. He was convicted of the crimes charged on December 29. He was put on probation for two years at disposition, *i.e.*, sentencing.

** References in parentheses preceded by "A." refer to the joint appendix filed in the Court of Appeals.

† The facts pertaining to Luis' arrest and the delinquency proceeding that followed are documented in petitioners' exhibit 2 received in evidence by the district court. The exhibit does not establish the exact date of Luis' arrest.

‡ A "designated felony act" is one of the class A, B or C felonies listed in FCA § 712(h)(i)-(v) when committed by a juvenile age 13, 14 or 15 or any felony committed by a juvenile age 7 through 15 with two prior felony convictions. § 712(h)(vi). Juveniles convicted of designated felonies receive lengthy sentences if the court finds that "restrictive placement" is required after dispositional hearing. FCA § 753-a(1). Restrictive placement for class A felonies is with the New York State Division of Youth ("DFY") for an initial period of 5 years of which at least 12 months must be in a secure

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quency contacts with the Family Court and that the probation service recommended his detention. Luis had a probable cause hearing under FCA § 739(b) on March 21, and probable cause was found on that date for the crimes charged in the delinquency petition.*

Kenneth was also fourteen and charged with attempted robbery and attempted grand larceny in a delinquency petition. (App. D at 91a). He had been arrested on March 25, 1978 after he, with another, allegedly tried to steal money from a couple, threatening to blow their heads off and grabbing them to search their pockets.** Kenneth was ordered detained under FCA § 739(a)(ii) after his detention hearing on March 27. The hearing record shows that the arresting officer was an eyewitness to the March 25 incident. It shows further that Kenneth was on release status from a pending petition (for robbery and criminal possession of stolen property) at the time of the hearing, that he had five prior arrests and that his mother had refused to pick him up from the police station after his arrest or to attend the

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facility. § 753-a(3)(a)(i), (ii). Restrictive placement for other than class A felonies is with DFY for an initial period of 3 years of which at least 6 months must be in a secure facility. § 753-a(4)(a)(i), (ii). Designated felony charges cannot be "adjusted" by the probation service, *i.e.*, compromised before a petition is filed, without approval of the court (FCA § 734[a][ii]), and designated felony petitions are usually prosecuted by district attorneys rather than civil law agencies. *See* FCA § 734-a(b).

* On April 11, the date scheduled for fact-finding with the consent of Luis' attorney, the prosecution did not proceed to the trial. The proceeding was discontinued on September 21. Petitioners' exhibit 2 (pp. 5-6) indicates that the discontinuance reflected the prosecution's preference for the designated felony (knifing) petition, but the point is not clear. The district court found that the discontinuance was a "termination without adjustment" (App. C at 39a), *i.e.*, a failure to prosecute because the complaining witness did not appear or chose not to proceed. (Trial transcript at 166 ["T. —"], A. 273). No exception was taken to that finding in the Court of Appeals.

** The facts pertaining to Kenneth's arrest and the delinquency proceeding that followed are documented in petitioner's exhibit 3 received in evidence by the district court.

hearing because Kenneth had been in trouble so often she did not want him at home.*

B. Claims and Proceedings in the District Court

The three juveniles challenged FCA § 739(a)(ii) on its face, claiming that the statute violated the due process and equal protection clauses of the Fourteenth Amendment. (App. D at 89a; First Amended Petition ¶¶ 9-12, Prayer for Relief ¶ b, A. 9-10). In support of their due process claim, the juveniles argued that § 739(a)(ii) infringed their fundamental interest in liberty, that it did not permit rational predictions of future behavior, that it was overbroad because first offenders and juveniles who posed a risk of committing trivial crimes could be detained and that it imposed punishment without trial. (App. C at 58a; Joint Pretrial Order § VI[A] ¶¶ 1, 3, 4-6, A. 39-40; Petitioners' Proposed Conclusions of Law ¶¶ 1, 3-6, A. 67).** They did not contend at any time that the conduct of the § 739(b) probable cause hearing up to six days (three days in ordinary course plus three days in "special circumstances" shown, *id.*) after pretrial detention under § 739 (a) (ii) denied accused delinquents procedural due process.

In support of their equal protection claim, the juveniles argued that New York did not have a compelling interest in FCA § 739(a)(ii) and that it could not permit accused

* Kenneth's fact-finding, first scheduled for March 30, was conducted on April 4 with the consent of his attorney. He was convicted of harassment and petty larceny on that date. He was placed with the New York City Commissioner of Social Services for 18 months at disposition. *See* FCA § 756(a), (b).

** The juveniles' argument that FCA § 739(a)(ii) imposed punishment without trial turned on the theory that pretrial detention violates the presumption of innocence because it occurs before the crime charged is proved beyond a reasonable doubt. Petitioners' Post-Trial Memorandum, pp. 81-98, Record on Appeal Document Number 16; Brief of Petitioners-Appellees in the Court of Appeals, pp. 75-82. *Contrast* majority opinion of the Court of Appeals (App. A at 17a-21a), finding that § 739(a)(ii) imposes punishment without trial because some accused delinquents detained under it may not reach fact-finding, *i.e.*, the charges against them may be withdrawn or dismissed before trial, and others, who are tried and convicted, may not receive sentences at disposition requiring confinement.

delinquents to be detained to protect the community from pretrial crime when it did not permit adults accused of crimes to be detained for the same reason. (App. C at 58a). A writ of habeas corpus and a declaratory judgment were sought by the three juveniles as representatives of a class. (App. C at 32a-33a; App. D at 89a-90a, 91a-92a).*

The proceeding was tried to the court without a jury in March, 1980. Three juveniles who had been charged with delinquency and detained before trial under FCA § 739(a)(ii) testified on appellees' behalf.** Appellees also called

* The district court granted class certification, over the opposition of the intervenor-appellant, on April 3, 1978. (App. D at 90a, 101a). The class was defined as "all juveniles who are now being held or will be held before these proceedings are concluded in pretrial detention under § 739(a)(ii) of the [Family Court] Act." (*Id.* at 101a). The parties read the term "juveniles" as "accused juvenile delinquents" throughout the proceedings below to conform the class definition to the standing and claims of the named appellees. *See* discussion p. 2 second footnote, 8-9, *ante*.

** The records of the delinquency proceedings against the three juveniles, Jerome Basnight (petitioners' exhibit 10, A. 887-902), Edwin Rodriguez (petitioners' exhibit 12, A. 917-36) and Juan Santiago (petitioners' exhibit 13, A. 937-46) were received in evidence by the district court.

Jerome had been arrested in the Bronx on October 14, 1977, at approximately 8 p.m., after he, with two others (including an adult), allegedly stole a woman's purse at gunpoint. A gun was discharged during the incident. Jerome, then 14, was charged with robbery 1 and criminal possession of a weapon 2. The record of his FCA § 739(a) detention hearing on October 20 shows that Jerome lived in Staten Island and that the presiding judge believed that Jerome's continued association with his friends in the Bronx made future criminal behavior likely. Probable cause for the crimes charged was found under § 739(b) on October 24, and Jerome was convicted of robbery 1 on November 1 after fact-finding. He was put on probation for 1 year at disposition.

Edwin had been arrested on December 13, 1977, at approximately midnight, after he, with three others, allegedly set fire to a subway token booth while the attendant was inside. He was then 14 and was charged with arson 2 and reckless endangerment. The record of Edwin's § 739(a) detention hearing on December 13 shows that he had not gone to school for the preceding 17 days and that the incident occurred at an hour when the presiding judge believed a 14 year old would be expected to be at home. The probation service did not report any prior arrests or Family Court contacts. However, Edwin testified at the trial below that he had been arrested several times

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an attorney who had represented juveniles in delinquency proceedings when he was with the Legal Aid Society, a supervisor of probation services in New York City and two expert witnesses, Leslie T. Wilkins and Lynnwood David Zinn, M.D.* They introduced the Family Court records of delinquency proceedings against thirty-four juveniles (including the named appellees and the three juveniles who testified at trial) who had been detained under § 739(a)(ii) before fact-finding at varying times between 1976 and 1979.** They also introduced several tables from a court

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before the December 13 incident and that the police had let him go home. (T. 15, A. 194). On December 16, at his § 739(b) probable cause hearing, Edwin pleaded guilty to attempted reckless endangerment. He was put on probation for 2 years at disposition.

Juan had been arrested on April 11, 1978 after he, with another, allegedly stole a handbag from a 71 year old woman, knocked her against a brick wall and to the ground, causing serious injuries. He was then 12 and was charged with robbery 1, assault, criminal possession of a weapon and criminal possession of stolen property. The record of Juan's § 739(a) detention hearing on April 12 shows that he had a dagger when he was arrested, that the probation service recommended detention and that the presiding judge was particularly concerned about the victim's age and the extent of her injuries. Probable cause for the crimes charged was found under § 739(b) on April 17, a hearing date requested by Juan's attorney. Juan was convicted of robbery 1 and criminal possession of a weapon on April 24 after fact-finding. Information then provided to the court by the probation service established that Juan had committed similar, previously unreported crimes before April 11. He was put on probation for 2 years at disposition.

* Mr. Wilkins is a criminologist and statistician who has made empirical studies of the post-conviction predictive decisions involved in the administration of criminal and juvenile justice, *e.g.*, recidivism after release on parole. He testified, in part, that the peak period for post-conviction recidivism after release from incarceration was 3 months and that the peak period for pretrial recidivism after arrest was probably the same. (T. 331-33, A. 417-19).

Dr. Zinn is a child psychiatrist and was Director of Child Psychiatry at a Chicago hospital at the time of trial. He testified, in part, that he considered the likelihood of future criminal behavior when he kept juveniles in the hospital for observation, admitted them for treatment and decided whether they should be released. (T. 414, 419, 431, A. 500, 505, 517).

** Appellees did not offer these case histories for the purpose of drawing generalized statistical conclusions about the relationship, if any, between § 739(a)(ii) pretrial detention orders and other pre- or

(footnote continued on next page)

administration report showing the number of detentions and the kinds of depositions in juvenile delinquency proceedings in New York in 1977 and a draft statistical study, prepared by the Vera Institute of Justice, following a sample of New York City juveniles from arrest through delinquency disposition. (*See* App. A at 8a n.18).*

Intervenor-appellant ("intervenor") called the Director of Detention Services of the New York State Division of Youth and the Deputy Commissioner of the New York City

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post-trial orders. Their expert statistician did not testify to any such conclusions or suggest that they could be made from the histories. The district court treated the histories anecdotally (App. C at 36a-49a), as did the parties, and did not use them in its discussion of the number of detentions and convictions in juvenile delinquency proceedings in 1977 and 1979 and the kinds of dispositions ordered. (*Id.* at 55a-57a, 60a-61a). *Contrast* majority opinion of the Court of Appeals (App. A at 8a-10a), characterizing the case histories as a representative sample of all juvenile delinquency proceedings involving pretrial detention under § 739(a)(ii) and using them as evidence of the "critical fact" that the "vast majority" of all juveniles so detained have their petitions dismissed before fact-finding or are "released" (*i.e.*, put on probation or receive no sentence as the Court of Appeals uses the term, *id.* at 8a n.18) at post-trial disposition. (*Id.* at 9a; *see also id.* at 10a, 15a, 17a, 18a-19a, 20a, 21a).

* The tables from the court administration report (petitioners' exhibit 38, A. 1210) and the Vera Study (petitioners' exhibit 44, A. 1254) combine detentions under § 739(a)(ii) with detentions under § 739(a)(i) (substantial probability of nonappearance), the subsection of § 739(a) not challenged in this proceeding. (App. A at 8a n. 18; App. C at 33a; *see* discussion pp. 3, 4, *ante*). The tables, and for the most part the Vera Study, also combine pretrial, *i.e.*, pre-fact-finding, detentions under § 739(a) (with subsections [i] and [ii] merged) with post-trial detentions under the statute, i.e. those between fact-finding and disposition. (Petitioners' exhibit 38, pp. 162-65, A. 1211-12; petitioners' exhibit 44, [letter dated March 28, 1980, p. 2], A. 1270). Because it reports the data in this manner, the Vera Study does not permit pretrial detentions under § 739(a)(ii), or under (a)(i) and (a)(ii) combined, to be compared with dispositional "release[s]" (*i.e.*, probation or no sentence as the Court of Appeals uses the term, App. A at 8a n.18) or with dispositional placements with local commissioners of social services or the State Division for Youth. *Contrast* majority opinion of the Court of Appeals (*id.* at 8a n.18), relying on the Vera Study, together with the 34 case histories (*see* discussion p. 10 second footnote), to establish the fact that the "vast majority" of all juveniles detained under § 739(a)(ii) before fact-finding are "released" (*i.e.*, put on probation or receive no sentence) rather than "placed" at disposition. (*Id.*; *see also id.*, at 9a-10a, 15a, 17a, 18a-19a, 20a, 21a).

Department of Juvenile Justice, the individual responsible for the detention services provided by that agency.* Intervenor also called two judges, Hon. Cesar Quinones and Hon. Margaret Driscoll. Judge Quinones, a New York City Family Court Judge for ten years at the time of trial, testified to practices and procedures at FCA § 739(a) detention hearings and at the subsequent proceedings in juvenile delinquency cases in New York.** Judge Driscoll, a Connecticut Superior Court Judge at the time of trial, a former Chief Judge of the Connecticut Juvenile Court and a former judge of that court, testified to the practices and procedures under the Connecticut detention standard that is

* Both men were specialists in detention practices and in the care of disturbed and delinquent children by virtue of their experiences and advanced educational credentials. They described the detention services their agencies offered, the bases for agencies' decisions assigning court-ordered detainees and other juveniles in their custody (*e.g.*, pre-court detainees brought to their facilities by the police, *see* FCA § 724[b][ii]; 9 New York Code, Rules and Regulations ["NYCRR"] § 180.3[a]) to secure (locked, self-contained facility) or nonsecure (open, community-oriented facility) detention, and provided summary statistical data about the number and kind (secure or nonsecure) of detentions in the state and city. The DFY Director of Detention Services also testified that his agency had decided not to revise its "serious risk" standard (*i.e.*, 9 NYCRR § 180.7[d][3][ii], applicable to pre-court admissions to detention facilities), which is the same as § 739(a)(ii). The agency had concluded that further substantive elaboration would likely result in some juveniles who were appropriate for detention being denied admission because their particular circumstances might not be listed in a revised standard while others, inappropriate for admission, would be detained, or presumptively detainable, because their particular circumstances were listed. (T. 301-303, A. 389-90).

** Judge Quinones had presided in all Parts of the Family Court and sat 2 or 3 months a year in Intake Part where § 739(a) hearings are conducted. He also had served 2 years of his Family Court term as an acting judge of the New York City Criminal Court, often presiding in that court's Arraignment Part. (T. 435-36, A. 521-22). He testified, in part, that the time period a judge considers under FCA § 739(a)(ii) in determining whether there is a serious risk that an accused delinquent will commit a crime is 3 months. (T. 460-63, A. 546-49). The period represents the time between the § 739(a) detention hearing and the scheduling of fact-finding for accused delinquents who are not detained. (*Id.*). This period corresponds with the peak period for pretrial recividism that Mr. Wilkins identified. (T. 331-33, A. 417-19 and discussion p. 10 footnote).

substantially identical to FCA § 739(a)(ii).* She also testified that pretrial detention standards for juveniles like § 739(a)(ii) were common in the United States (T. 638-39, A. 700-701) and that they were the most appropriate means for serving the interests of the juvenile and the community when parental authority was not effective. (T. 649-50, 669-70, A. 710-11, 730-31).** She concluded by criticizing, as too

* Connecticut permits accused juvenile delinquents to be detained upon a judicial finding that there is a "strong probability that the child will commit or attempt to commit other offenses injurious to himself or to the community before court disposition." Conn. Gen. Stat. Ann. § 46b-131(1) (1982 Supp.). "[O]ffenses injurious to himself or to the community" include all crimes. (T. 651-62, A. 712-13). Connecticut practice differs from New York by requiring a contemporaneous finding of "reasonable cause" to support pretrial detention. *Id.* § 46b-131. The finding may be based on affidavits. (T. 653, A. 714). New York requires an adversarial, evidentiary hearing. FCA § 739(b) and discussion pp. 3, 4, *ante*. Connecticut also authorizes bail for accused delinquents, but the authority is rarely invoked. Conn. Gen. Stat. Ann. § 46b-131 (1982 Supp.). (T. 649-50, A 710-11). New York does not.

** Eight of fifty-one American jursdictions (excluding New York) have standards substantially identical to FCA § 739(a)(ii), variously requiring "strong probability" or "reasonable" or "probable cause" to believe the accused juvenile will commit a crime. Ariz. R. Proc. Juv. Cts. 3 (1978); Ark. Stat. Ann. § 45-421 (1981 Cum. Supp.); Conn. Gen. Stat. Ann. § 46b-131 (1982 Supp.); Fla. Stat. Ann. § 39.032 (1981 Supp.); La. Rev. Stat. Ann. § 1577 (1981 Supp.); La. Civ. Code art. 40 (1977); Me. Rev. Stat. Ann. tit. 15, § 3203 (1980); N.M. Stat. Ann. § 32-1-24 (1982 Supp.); Wis. Stat. Ann. § 48.205 (1977).

Eleven jurisdictions have standards which are arguably more specific than FCA § 739(a)(ii), variously requiring a threat of dangerous or serious crime or serious bodily harm to self or others, albeit these standards would not, according to the testimony of Mr. Wilkins, result in more accurate predictions. (*See* discussion subsection A. p. 22, *post*.) Ala. Code § 12-15-59 (1982); Iowa Ann. Stat. §§ 232.22, 232.44 (1981 Supp.); Kan. Stat. Ann. § 38-815b (1981 Supp.); Mich. Comp. Laws Ann. § 712A.15 (1982-83 Supp.); N.H. Rev. Stat. Ann. § 169B:14 (1981 Supp.); N.J. Stat. Ann. § 2A:4-56 (1982 Supp.); N.C. Gen. Stat. § 7A-574 (1981); Tex. Fam. Code Ann. § 53.02 (1982-83 Supp.); Utah Code Ann. § 78-3a-30 (1981 Supp.); Va. Code Ann. §16.1-248 (1982); Wash. Rev. Code Ann. § 13.40.040 (1982 Supp.).

Twenty-eight jurisdictions permit the pretrial detention of juveniles under a very broadly stated standard for decision, *e.g.*, in the best

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restrictive, advisory juvenile justice standards that limited preventive detention to accused delinquents who were charged with certain crimes, *e.g.*, violent crimes, crimes resulting in bodily harm, or who were found likely to commit certain crimes before trial. (T. 664-65, 667-68, A. 725-26, 728-29).*

In its April 17, 1981 opinion, the district court held that FCA § 739(a)(ii) violates the rights of the appellees and of the class members they represent to due process of law, both on its face and as applied. (App. C at 88a). Three bases for the ruling are given. (*Id.* at 65a-88a). First, § 739(a)(ii) is said to deny due process because it permits judges at pretrial detention hearings to exercise standardless discretion in predicting future criminal behavior, an

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interest of the juvenile or for the juvenile's protection, a concept which includes protecting him and the community from his future criminal acts. 18 U.S.C. § 5034; Alaska Stat. § 47.10.140 (1982); Cal. Welf. & Inst'ns § 628 (1979); Col. Rev. Stat. Ann. § 19-2-102 (1981 Cum. Supp.); Del. Code Ann. §§ 934, 936 (1980); D.C. Code Ann. § 16-2310 (1981); Ga. Code Ann. §§ 24-2416, 24A-1401 (1982 Supp.); Hawaii Rev. Stat. §§ 571-31, 571-31.1 (1981 Supp.); Idaho Code § 16-1811 (1982 Supp.); Ill. Ann. Stat. ch. 37, §§ 703-4, 703-6 (1982-83 Supp.); Ind. Ann. Stat. § 31-6-4-5 (1980); Ky. Rev. Stat. § 208.110 (1982); Md. Ann. Code § 3-815 (1982 Supp.); Minn. Stat. Ann. § 260.171 (1982); Miss. Code Ann. § 43-23-11 (1981); Mo. R. Juv. Ct. 111.02 (1982); Mont. Rev. Code Ann. § 41-5-305 (1981); Nev. Rev. Stat. § 62.140 (1981); N.D. Cent. Code §§ 27-20-14, 27-20-17 (1981 Supp.); Ohio R. Juv. Proc. 6 (1980); Or. Rev. Stat. § 419.573 (1981); Pa. Stat. Ann. § 6325 (1978 Supp.); S.C. Code Ann. § 20-7-600 (1981 Supp.); S.D. Code § 26-8-19.2 (1982 Supp.); Tenn. Code Ann. §§ 37-214, 37-217 (1982 Supp.); Vt. Stat. Ann. tit. 33, § 643 (1981); W. Va. Code Ann. §§ 49-5A-2, 49-5-8 (1982 Supp.); Wyo. Stat. Ann. § 14-6-206 (1980).

One jurisdiction appears to permit detention only if the juvenile's parent's will not guarantee his appearance, he cannot make bond and his surroundings endanger his welfare. Okla. Stat. Ann. tit. 10, § 1107 (1981-82 Supp.).

Three jurisdictions do not appear to have any standard set by statute or court rule. Mass. Ann. Laws ch. 19, § 68 (1982 Supp.); Neb. Rev. Stat. § 43-248 (1982 Supp.); R.I. Gen. Laws Ann. § 14-1-21 (1982 Supp.).

* At the time of trial, Judge Driscoll was Chairman of the Standards Committee of the National Advisory Committee on Juvenile Justice and Delinquency Prevention ("NAC"). (T. 633-34, A. 695-96). She was responsible for drafting the commentary for NAC's advisory juvenile justice standards. (T. 661-62, A. 722-23).

event which, according to the court, is not amenable to reasoned or accurate decision-making in any circumstance. (*Id.* at 65a-68a).* Prospective decisions required in bail and sentencing proceedings are distinguished on the grounds that they are made after "hearings" where "all possible relevant information" is available. (*Id.* at 789). Sentencing decisions are further distinguished on the ground that the crime charged has been proved beyond a reasonable doubt. (*Id.*). Second, § 739(a)(ii) is said to deny due process because the potential six day delay between detention and a judicial finding of probable cause violates the presumption of innocence. (*Id.* at 82a-84a).** Third, § 739(a)(ii) is said to deny due process because it imposes punishment without trial. (*Id.* at 84a-88a). The statute's acknowledged community protection purpose is found inadequate as an "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), on the ground that community protection is indistinguishable from the purposes of the juvenile justice system as a whole. (*Id.* at 86a). Community protection is then accepted *arguendo* by the court as an adequate "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, *supra*, but § 739(a)(ii) is found not "rationally . . . connected" to it because of the inability of judges to predict future crime. (*Id.*). The stigma that

* The opinion's textual reference to § 739(a)(ii) (*id.* at 33a n.2) omits the statute's express requirement that the "facts and means" supporting a detention order be stated on the record, and the opinion does not consider the requirement at any point. The opinion includes an extended discussion, drawn from current literature, about the reliability of clinical and statistical predictions of violent and dangerous crimes. (*Id.* at 68a-76a). The materials cited are not part of the record.

** In its discussion on this point, the district court states that "[i]n some instances [the accused delinquent] is before the court [at his § 739(a) detention hearing] on a delinquency petition filed on information and belief . . . not verified by someone with direct knowledge of what took place." (*Id.* at 82a). According to the unopposed testimony of Judge Quinones, this statement is not true. All petitions which come before the court at § 739(a) hearings must be sworn to by individuals with personal knowledge of the facts or supported by affidavits or oral, in-court statements of such persons. (T. 444-47, A. 530-33). This requirement has been codified in the new Article 3 at §§ 311.1, 311.2.

allegedly results from detention for anticipated crimes and the potential six day delay in a judicial finding of probable cause are noted in further support of the punishment without trial rationale. (*Id.* at 85a, 86a-87a).

The district court opinion rejects appellees' equal protection claim, finding that § 739(a)(ii) is not subject to scrutiny under the compelling state interest test (*id.* at 60a-63a) and that while the statute does differentiate between juveniles and adults, such distinctions are "too ingrained" in the "network of laws that the states have devised to deal with the problems of the young—delinquency, neglect and care" to be considered invidious. (*Id.* at 63a, 64a).*

The district court entered a declaratory judgment in conformity with its opinion and granted writs of habeas corpus for the class on June 1, 1981. (App. B at 30a-31a).** In a later clarifying memorandum, answering an inquiry

* The district court says, in dicta, that § 739(a)(ii) would not survive strict scrutiny because the state's compelling interest in that statute is inconsistent with the fact that the "overwhelming majority" of juveniles who are detained under it before trial are put on probation or receive no sentences at disposition. (*Id.* at 61a). This conclusion relies on the 1977 tables from the court administration report introduced by appellees (petitioners' exhibit 38, A. 1210) and on similar tables for 1979 from the same source (court exhibits, A. 1362) which the district court obtained on its own initiative without the knowledge of the parties. (*See id.* at 55a-57a, 60a-61a). As the majority opinion of the Court of Appeals observes in adopting a different approach to the data (App. A at 8a n.18, *see* discussion p. 11 footnote), the 1977 and 1979 tables combine detentions under § 739(a)(ii) with detentions under § 739(a)(i) and do not match detentions with dispositions. They also combine pretrial, *i.e.*, pre-fact-finding, detentions under § 739a (with subsections [i] and [ii] merged), with post-trial detentions under the statute, *i.e.*, those between fact-finding and disposition. (Petitioners' exhibit 38, pp. 162-165, A. 1211-12; court exhibits, pp. 86, 87, A. 1362, 1363). In addition, the district court made extensive errors in transposing the data from both the 1977 and 1979 tables which were called to the attention of the Court of Appeals. Brief for Intervenor-Appellant, pp. 39-40, 53-55.

** The writ provision in the judgment states in terms (App. B at 31a ¶ 2): "The application for writs of *habeas corpus* for members of petitioner [appellee] class in the custody of the respondent [appellant] is granted and all class members in custody pursuant to Family Court Act Section 739(a)(ii) shall be released forthwith."

from the intervenor, the court held that the writ was effective to release accused delinquents who entered appellant's custody (but not that of other detention authorities in the state) under § 739(a)(ii) orders made after the writ was granted, *i.e.*, after June 1, 1981. (August 5, 1981 Memorandum to All Counsel, A. 187).* A motion by appellant and intervenor for a stay of the writ's prospective effect was denied by a panel of the Court of Appeals on September 22, 1982.

C. Opinions of the Court of Appeals

The Court of Appeals affirmed the district court insofar as it held FCA § 739(a)(ii) unconstitutional on its face under the due process clause of the Fourteenth Amendment. (App. A at 19a-20a, 22a). The majority opinion accepts the community protection purpose of § 739(a)(ii) as constitutionally permissible (*id.* at 17a) and finds the purpose satisfied in a "minority" of the cases in which the statute is applied (*id.* at 19a). These cases are said to occur when an accused delinquent who was detained under § 739(a)(ii) is later adjudicated, *i.e.*, convicted, and "restrictively placed" at disposition. (*Id.* at 8a n.18).** Conversely, the majority finds the community protection purpose of § 739(a)(ii) is not satisfied in the "vast majority" of cases in which it is applied (*id.* at 17a, 19a) and, for this reason,

* The court apparently relied on its April 3, 1978 class definition to reach this result, reading "before these proceedings are concluded" (App. D at 101a) to include the appellate phase of the case.

** The court's reference to "restrictive placement" in this context is mistaken. Under the Family Court Act, "placement" is a commitment for a term to a local commissioner of social services or the State Division for Youth. *See* FCA §§ 753(1)(b), (d), (e), 756. "Restrictive placement" is but one form of commitment and may be ordered in designated felony cases if found appropriate by the court. *See* FCA § 753-a and discussion p. 6 fourth footnote. The placement percentages the majority recites at this point in its opinion are derived from all CSS and DFY placements, not "restrictive placements".

holds the statute invalid as imposing punishment without trial. (*Id.* at 19a, 20a).*

The cases in which the community protection purpose of § 739(a)(ii) is not satisfied are said, by the majority, to occur when: (1) the charges against an accused delinquent detained under § 739(a)(ii) are withdrawn or dismissed before fact-finding, *i.e.*, trial on the crime(s) charged; (2) an accused delinquent detained under § 739(a)(ii) is released after a short period of time; and (3) an accused delinquent detained under § 739(a)(ii) is adjudicated after fact-finding but not placed away from home at disposition. (*Id.* at 17a, 18a). These cases, assessed retrospectively as the classification adopted by the majority requires, are found to involve either "mistakes in judgment" by the Family Court judges who concluded that detention was necessary after conducting § 739(a) pretrial detention hearings or "the imposition of incarceration solely as punishment for unadjudicated crimes." (*Id.* at 18a-19a). The "mistakes in judgment" are then said to be "fostered by 739(a)(ii)'s procedurally and substantively unlimited terms." (*Id.* at 18a; *see also id.* at 20a, 21a). The procedural and substantive deficiencies noted in this regard are the absence from the statute of procedural safeguards and criteria elaborating the serious risk standard (*id.* at 7a, 8a) and the like-

* The court's conclusion that § 739(a)(ii) does not serve a community protection purpose in the vast majority of cases is based on the relationship between the number of supposed pretrial detentions under § 739(a)(ii) and the number of post-trial placements of delinquents so detained with CSS and DFY. (*Id.* at 8a n.18). The data from which this relationship is inferred are the 34 case histories in the record and the Vera Study. (*Id.*). As observed at p. 10 second footnote, the case histories are not a representative sample of all juvenile delinquency proceedings and were not offered, or used, below to draw generalized statistical conclusions about pretrial detention and placement. As further observed at p. 11 footnote, the Vera Study, like the court administration reports the majority rejects as unreliable (*id.*), combines detentions under § 739(a)(i) and § 739(a)(ii) and does not report pretrial detention in either, or both, categories in a manner that permits it to be compared with dispositional placements or "release[s]," *i.e.*, probation or no sentence, as the majority uses the term. (*Id.*).

lihood of any pretrial crime as the basis for detention. (*Id.* at 7a).*

The majority concludes its opinion by affirming the *in futuro* effect of the writ of hebeas corpus granted by the district court. (*Id.* at 21a-22a). The "in custody" requirement of 28 U.S.C. § 2254 is held no bar to the release of juveniles who were not ordered detained, and perforce were not "in custody" when the writ was granted. (*Id.* at 22a). Intervenors' argument that attributing continuing effect to a writ mistakes habeas corpus proceedings for actions for injunctions is noted (*id.* at 21a-22a) but discounted on the theory that § 739(a)(ii) could have been enjoined in a Section 1983 action against the appellant. (*Id.* at 22a n.36).**

The concurring opinion, like the majority, accepts the community protection purpose of FCA § 739(a)(ii) as constitutionally permissible (*id.* at 23a & n.1) and finds the statute invalid under the due process clause. However, it offers a more traditional due process analysis than that provided by the majority. (*Id.* at 24a-29a).† The three-factor test recited in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1975), is followed. (*Id.* at 24a). The accused delinquent's interest in pretrial liberty is found to be fundamentally important (*id.* at 24a-25a), and the government's interest in preventing pretrial crime, of great significance. (*Id.* at 25a). The opinion then turns to the third factor, the risk of an erroneous deprivation of liberty and the probable value, if any, of additional or substitute safeguards. (*Id.* at 24a, 27a-29a). The risk of an erroneous deprivation of

* Neither the requirement in § 739(a)(ii) that the "facts and reasons" supporting detention be stated on the record nor the requirement in § 739(b) for an adversarial probable cause hearing within 6 days of detention is considered.

** The opinion observes that appellant and intervenor are free to seek a stay of the writ's continuing effect in the Court of Appeals. (*Id.* at 22a). As noted at p. 17, *ante*, appellant and intervenor had so moved previously, and their request had been denied.

† The concurring opinion chooses this course because of its expressed uncertainty that the record supports the majority's conclusion that § 739(a)(ii) has produced a significant number of mistaken detention decisions or has been used to impose impermissible punishment. (*Id.* at 23a-24a).

liberty under § 739(a)(ii) is found to be high because of the difficulty of predicting future crime (*id.* at 25a-27a), and the statute found to be without certain limitations which, according to the concurring opinion, enhance the risk of error. (*Id.* at 27a). Five alleged deficiencies in § 739(a)(ii) are noted in this regard (*id.* at 27a-28a): (1) it permits detention if any crime is charged and the other constraints of the statute are met; (2) it does not require a finding of probable cause or other proof of guilt on the crime charged at the detention hearing; (3) it does not require the judge presiding at the detention hearing to assess the accused delinquent's background; (4) it permits detention based on the likelihood of any pretrial crime; and (5) it does not contain a standard of proof on which the finding of serious risk of crime must be based.*

Reasons for Plenary Consideration

The opinions and judgment below conflict with the decision of the New York State Court of Appeals in *New York ex rel. Wayburn* v. *Schupf*, 39 N.Y.2d 682 (1976), which upheld New York Family Court Act § 7839(a)(ii) in face of the same due process challenge presented here. The statute permits accused juvenile delinquents to be detained on a judicial finding of serious risk of pretrial crime supported by facts and reasons stated on the record of a detention hearing. It was invalidated below based on an unsound due process analysis and without appropriate regard for relevant precedent. The consequences of this erroneous ruling were projected into the future in New York by the issuance of a writ of habeas corpus that was an injunction for all practical purposes and will extend to the United States, if not reversed, since virtually all state and federal jurisdictions have juvenile detention standards like FCA § 739(a)(ii). This Court has yet to address the procedural due process rights of juveniles in the pretrial

* The concurring opinion, like the opinions of the majority and of the district court, fails to consider the "facts and reasons" requirement in § 739(a)(ii). *See* discussion pp. 15 first footnote, 19 first footnote.

phase of delinquency proceedings (*see In Re Gault*, 387 U.S. 1, 13, 31 n.48 [1967]) and should do so in this case to resolve the conflict between the state and federal courts and to settle the question for the nation as a whole.

A. The standard and procedures for pretrial detention under New York Family Court Act § 739(a)(ii) afford accused juvenile delinquents fundamental fairness.

FCA § 739(a)(ii) establishes a fundamentally fair standard for prospective judicial decision-making that forecloses, rather than permits, arbitrary actions by the Family Court judges who must apply it. *Contrast* opinion below, App. A at 20a, 21a; concurring opinion, *id.* at 27a-28a.* To order an accused juvenile delinquent detained under § 739(a)(ii), a Family Court judge must conduct a detention hearing, find that there is a "serious risk" that accused may commit a crime before trial if released and support his finding by "facts and reasons" stated on the stenographic record or in an endorsement.** The accused who is detained thereby obtains a reviewable record which

* Intervenor has assumed throughout this proceeding that an accused juvenile delinquent's procedural due process right in the pretrial phase of a delinquency proceeding is one of "fundamental fairness." *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543 (1971). This Court has not yet considered the scope of a juvenile's procedural due process rights in these circumstances or the standard that should apply. *See In Re Gault*, 387 U.S. 1, 13, 31 n.48 (1967).

** The detention hearing must proceed on a delinquency petition supported by affidavits or in-court statements by individuals with personal knowledge of the facts constituting the crime charged. See discussion p. 15 second footnote. The accused delinquent must be present, has a right to counsel, to remain silent and to enter a plea to the charges. FCA § 741(a). (T. 448-534). The prosecuting attorney must be present as must a representative of the local probation service. (T. 474, A. 533). The accused delinquent may contest the sufficiency of the petition (T. 444, A. 530) and produce witnesses on his behalf to attest to his character and reputation and/or to support a claim of innocence or a defense to the charge. (T. 454-55, A. 540-41). The accused delinquent's parent or adult responsible for his care is notified about the hearing and requested to attend. FCA § 741(a).

protects him, as it would protect an adult, from an arbitrary or erroneous deprivation of his liberty.*

Contrary to the opinions of the Court of Appeals (App. A at 7a; concurring opinion, *id.* at 27a, 28a), the authority FCA § 739(a)(ii) grants a Family Court judge to detain an accused delinquent who is charged with any crime, rather than a particular crime, based on the likelihood that he will commit any pretrial crime, is not a "substantive" deficiency in the statute, nor a matter of constitutional dimension. The express legislative purposes of § 739(a)(ii), like all other provisions of the Family Court Act involved in juvenile delinquency proceedings, are "the needs and best interests" of the juvenile and "the need for protecting the community." FCA § 711. The Court of Appeals does not suggest how particularizing the crimes for which § 739(a)(ii) detention could be ordered would implement these legislative purposes better than the current "all crime" standard, if at all. Nor does it suggest why particularizing crime is required to provide fundamental fairness to juveniles, and no reason is apparent.**

The same result obtains with respect to the second "substantive" deficiency the Court of Appeals attributes to FCA § 739(a)(ii), the absence of "criteria" elaborating the serious risk standard. (App. A at 8a; concurring opinion, *id.* at 27a-28a). The express requirement in FCA § 739(a)(ii) that the "facts and reasons" supporting a de-

* Under New York practice, FCA § 739(a) detention orders are reviewable initially by writ of habeas corpus in State Supreme Court and by direct appeal thereafter. *New York ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682 (1976), the New York Court of Appeals case upholding FCA § 739(a)(ii) against the identical due process and equal protection claims made below, was brought in this manner.

** If the Court of Appeals is suggesting that greater particularization of crimes under § 739(a)(ii) would enhance the accuracy of the predictive decisions that statute requires, it is in error. According to the unopposed testimony of Mr. Wilkins, a statistician and criminologist, predictions of "serious crimes" or "crimes of violence" are "a lot worse," *i.e.*, more inaccurate, than predictions of crime *vel non*. (T. 329, A. 41§). *See* discussion pp. 13-14, *ante*, noting Judge Driscoll's opposition to pretrial detention standards that were limited to certain kinds of crimes.

tention order be stated on the record meets any question of constitutional dimension that could arise from this source. *See Kent* v. *United States*, 383 U.S. 541, 553, 557 (1966) (accused delinquent's due process rights at critical stage of proceedings, satisfied by assignment of counsel, access to relevant records, informal hearing and statement of reasons for adverse decision). *See also Wolff* v. *McDonnell*, 428 U.S. 539 (1974) (adult inmate's due process rights at disciplinary proceedings that could result in extending incarceration, satisfied by modified adversarial hearing and statement of reasons for adverse decision). To the extent bail statutes are more elaborate than § 739(a)(ii), or (a)(i), the juvenile detention standard analogous to bail, the added entail is a matter of legislative choice, not constitutional imperative. Notably, the statutory elaboration in bail statutes (*see e.g.*, CPL § 150.30[a][i]-[a][viii]) is merely a list of areas for the court to consider. It does not assure that the relevant information will be available, that the court will weigh the information it receives in a particular manner or that its decision will be accurate.*

* The statement in the concurring opinion that FCA § 739(a)(ii) does not require a Family Court judge presiding at a detention hearing "to assess the individual's background" (App. A at 28a) does not mean that the judge does not do so. According to the unopposed testimony of Judge Quinones, certain common factors are considered by all judges at detention hearings. (T. 464-65, A. 550-51). They are as follows: The seriousness of the charge (T. 465, A. 551); whether the charge shows a state of mind, or lack of control, amounting to disregard for the safety and property of others and the probability the charge will be proved at trial (T. 465-66, A. 551-52); the juvenile's prior record and its relationship in time to the current charge (T. 468-69, A. 554-55); the adequacy and effectiveness of the juvenile's supervision at home, evidenced, in part, by the time of day the alleged crime charged was committed and, in part, by the statements of adults responsible for the juvenile's care (T. 463-64, 466-67, A. 549-50, A. 552-53); the juvenile's behavior at school, including truancy (T. 464, A. 550); the statements of witnesses at the hearing (T. 454-55, A. 540-51); and the recommendation of the probation service (T. 467, A. 549) as well as any special circumstances presented by the case. (T. 463, 497, A. 549, 583). Judge Driscoll testified that she considered essentially the same factors under the Connecticut detention standard that is substantially identical to § 739(a)(ii). *See* discussion pp. 12-13, *ante*. (T. 657-60, 680, 682, A. 718-21, 741, 743).

As the concurring opinion in Court of Appeals observes (App. A at 29a n.8), no due process challenge to the "procedural" aspects of FCA § 739(a)(ii) can rely on the "traditional . . . requirements" of notice and hearing since these requirements are amply met. *See* discussion p. 21 second footnote.* As that opinion further observes, in part (*id.* at 27a), the procedural sufficiency of § 739(a)(ii) may turn on the timing and adequacy of the probable cause determination. While this Court has not yet addressed this question in the context of preventive detention, the recent decision in *United States* v. *Edwards*, 430 A.2d 1321, 1333-41 (D.C. App. 1981) (*en banc*), *cert denied*, —— U.S. ——, 102 S.Ct. 1721 (1982), has, finding that the preventive detention of adults for up to seven days before a finding of probable cause under the non-adversarial *Gerstein* v. *Pugh* standard (420 U.S. 103, 114, 120-26 [1975]) was permissible. FCA § 739(a)(ii) obviously improves upon that standard since an adversarial finding of probable cause under subsection (b) must be made within six days of detention. Intervenor notes, in addition, that the *Gerstein* standard is satisfied at the detention hearing itself by the verified petition and supporting direct knowledge affidavits or in-court statements (*see* discussion p. 21 second footnote) although the presiding judge is not then required to find that probable cause exists.

B. New York Family Court Act § 739(a)(ii) does not impose unconstitutional punishment on accused juvenile delinquents.

The analysis offered by the majority opinion of the Court of Appeals (App. at 9a-21a) to support the proposition that FCA § 739(a)(ii) imposes unconstitutional punishment without trial is unsound.

The standards which guide the inquiry are set forth in *Bell* v. *Wolfish*, 441 U.S. 520, 537-38 (1979), *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) and, most

* The comment in the majority opinion (App. A at 8a) that "[t]he statute itself offers no procedural safeguards" is simply wrong.

recently, in *United States* v. *Edwards*, 430 A.2d at 1331-33. None of these opinions is referenced by the majority, and their application to § 739(a)(ii) requires that the statute be found regulatory, not penal, for the same reasons as the District of Columbia preventive detention statute was found regulatory in *Edwards*. *Id.* FCA §739(a)(ii) has the same "alternative purpose" (*Kennedy* v. *Mendoza-Martinez*, *supra*) as the District of Columbia statute, to protect the community from the accused's future criminal acts, not to punish him for his past conduct. Majority opinion, App. A at 17a; *Edwards*, *id.* at 1332. The pretrial detention § 739(a)(ii) authorizes is for a brief period, far less than the sixty days allowed in *Edwards*, and, as in *Edwards*, it is terminable if a subsequent event, *e.g.*, the failure to find probable cause after a § 739(b) hearing, eliminates the basis for it. (*Id.*).

Perhaps more significantly, the majority's recourse to a retrospective test is completely without authority in decisional law and produces inappropriate comparisons and anomalous results. FCA § 739(a)(ii) does not lose its community protection purpose, and a detention order under it does not become a "mistake" if, for example, a prosecution is dismissed before trial because the complaining witness dies. *Contrast* majority opinion, App. A at 18a. Nor does the statute lose its purpose, or a detention order became a mistake because the accused delinquent is quickly released or not placed, *i.e.*, sentenced for a term with a local commissioner of social services or the State Division For Youth at disposition. *See* majority opinion, *id.* at 17a-18a. The juvenile's circumstances, as well as the nature of the case against him, may change in the intervening period between detention and release. For example, his conduct in detention may evidence that the risk of his committing criminal acts in the open society has diminished, or he may have indicated a willinness to accept his parents' authority. Further, the fact that a judge presiding at dispositional hearing decides that probation, rather than a five year restrictive placement with DFY (*see* FCA § 753-a), an example cited by the majority (*id.* at 8a, n.18), is to be preferred does not mean that a § 739(a)(ii) order for brief

pretrial detention was a mistake. Even if these kinds of comparisons between pretrial detentions and dispositional placements were considered appropriate, the data available in the record does not permit them to be made. *See* discussion pp. 10 second footnote, 11 footnote, 18 footnote.

C. The writ of habeas corpus issued by the district court could not be invoked to release accused juvenile delinquents who were detained under New York Family Court Act § 739(a)(ii) after it was granted.

The writ of habeas corpus in the June 1, 1981 judgment (App. B at 31a), as interpreted by the district court's August 5 memorandum (*see* discussion pp. 16-17), purports to release juveniles from the custody of the appellant who were not even ordered detained under FCA § 739(a)(ii) when the writ was granted. The prospective effect thus attributed to the writ is a plain violation of the "in custody" requirement of 28 U.S.C. § 2254. While, as the majority opinion of the Court of Appeals observes (App. A at 21a), habeas corpus procedings may be brought as class actions, and the writ is available to persons "in custody" to attack their future confinement, no authority has allowed the writ to issue on behalf of unknown individuals who are not in any form of custody.

The novel procedural device adopted by the district court and affirmed by the Court of Appeals effectively transforms the writ into an injunction enforceable against the appellant. This result is opposed by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), which limits claims for release from detention to habeas corpus proceedings, and provides appellees with an injunction remedy which was not available to them.*

* The comment in the majority opinion (App. A at 22a n.36) that a Section 1983 action to enjoin FCA § 739(a)(ii) could have been brought against appellant is incorrect. Appellant merely received individuals into his custody under orders issued by Family Court and was immune from suit concerning the underlying validity of the orders. *See Lockhart* v. *Hoenstine*, 411 F.2d 455, 459-60 (3rd Cir.), *cert. denied* 396 U.S. 941 (1969). Equally, relief awarded against him would be ineffective since Family Court judges, not detention authorities, issue the orders § 739(a)(ii) authorizes.

Conclusion

For the foregoing reasons, probable jurisdiction should be noted and plenary consideration afforded this appeal.

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